No. 80-1586

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

IN RE GULF OIL CORPORATION

and

GULF MINERALS CANADA LIMITED

Petition for a Writ of Mandamus to the Honorable Prentice H. Marshall, Judge of the United States District Court for the Northern District of Illinois, Eastern District

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REPLY BRIEF

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May 26, 1981

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REPLY BRIEF

1. The Foreign Policy Implications of This Case Merit The Exercise of This Court's Extraordinary Jurisdiction.

Respondent Tennessee Valley Authority ("TVA") asserts that this case does not warrant this Court's exercise of mandamus jurisdiction because the factors prompting that exercise in *Ex Parte Peru*, 318 U.S. 578 (1943), are not present here. That contention cannot withstand analysis.

TVA reads *Ex Parte Peru* as resting entirely upon the representations of the Executive to this Court that the Executive was trying to settle the underlying dispute by diplomacy. Here, according to TVA, there are no ongoing efforts to settle any international dispute. (TVA Br. at 7.) This argument is legally incorrect and factually misleading.

Ex Parte Peru holds that this Court will exercise its discretion to issue the writ of mandamus without a prior application to a court of appeals when the question involved is of public importance or of such a nature that it is peculiarly appropriate that this Court act. *Ex Parte Peru* provides an example of such a question, not an exhaustive catalogue. The Executive's communication is irrelevant here for two reasons: (1) a majority of this Court recognized in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), that the act of state doctrine is a constitutional principle and hence is unaffected by the Executive's attitude towards particular litigation; and (2) this Court has directed that foreign governments speak directly to the courts rather than through the Executive.

Here, Canada has spoken directly to the district court and to this Court, stating, among other things, that its relations with the United States are being damaged by the continuation of this and other cases challenging actions required by Canadian regulation (Main App. I 121a-122a).[1] That is the kind of question—of public importance and of a nature peculiarly suited to this Court—which, within the contemplation of *Ex Parte Peru*, warrants the grant of a writ of mandamus.

TVA's assertion that there are no ongoing diplomatic efforts can only mean that an intensive series of such efforts have recently ceased. In all, there are thirty-seven known items of diplomatic correspondence between the United States and its allies concerning the U.S. Atomic Energy Commission's embargo of foreign uranium, the resulting foreign government uranium cartel, and foreign government objections to American judicial in-

[1] References to the separately bound appendix accompanying the Petition for A Writ of Mandamus are cited, e.g., (Main App. B 10a). References to the appendix accompanying this Reply Brief are cited, e.g., (Reply App. A 1a).

quiry into that cartel. As Roberts B. Owen, then State Department Legal Advisor, put it in a letter to the Department of Justice on March 17, 1980:

> The fact is that the foreign governments concerned have substantial interest not only in this litigation, but also in certain broader issues which it raises. *There has been considerable high-level diplomatic correspondence over the matter for several years.* (Main App. Q 245a; emphasis added.)[2]

If there is no ongoing diplomatic effort at the moment, there certainly was throughout the prior history of this litigation.

But, the main point is that this case is damaging United States relations with friendly foreign nations. Canada and other foreign nations have said so in official representations. TVA, in effect, asks this Court to ignore those representations by offering the assertion of the current Acting Legal Advisor in the State Department that prosecution of the Uranium Cases will not, in and of itself, necessarily result in damage to American foreign relations. (TVA Br. at 7-8.) This assessment is distinctly odd in view of the representations of foreign governments that these cases are doing such damage. The Acting Legal Advisor's opinion is like that of a man who says he has a very happy marriage although his wife is miserable about the relationship. The Department of State has not always been so offhand about the foreign policy implications of these cases.[3]

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[2] Mr. Owen was writing about the *Westinghouse* litigation, with which the *TVA* litigation was joined for pre-trial proceedings, but his remarks applied to both cases.

[3] In the letter quoted at note 2, *supra*, Mr. Owen states that the insensitivity shown by the Court of Appeals for the Seventh Circuit to the concerns of the foreign governments "has caused *serious embarrassment* to the United States in its relations with some of our closest allies." (Main App. Q. 245a; emphasis added.)

The plain facts are that American foreign relations are being damaged by the continuation of that aspect of this litigation which concerns Canadian regulation of its own uranium industry. Since this case is not a dispute over title to one cargo ship but concerns the power of American courts to invade the sovereignty of foreign nations, most particularly that of Canada, the case for the exercise of mandamus jurisdiction here is far more compelling than it was in *Ex Parte Peru.* Petitioners cannot comprehend why no court has paid the slightest attention to the official representations of Canada and other foreign governments. We respectfully suggest that this Court should do so now.

2. Partial Summary Judgment is Clearly Warranted In This Case.

This case differs from *General Atomic Co. v. United Nuclear Corp.*, No. 80-1360, *cert. denied, petition for rehearing pending*, in ways that may be crucial to the disposition of this petition. Though petitioners cannot of course know, they believe that certiorari must have been denied there because this Court thought the entire case governed by the Supreme Court of New Mexico's findings of discovery failure. Though petitioners thought those findings clearly erroneous in major respects and insufficient to justify the default, the fact is that this case is in a far different procedural posture.

Petitioners here sought only partial summary judgment. They sought to remove from the case only those issues which concerned the terms upon which uranium was exported from Canada. All other allegations of antitrust violations would remain for trial. The motion was framed in this way because Canada independently regulated every term of every uranium export sale, including all sales to the United States. Such regulation is clearly an act of state and those who comply with the regulation cannot be held liable for that compliance. As

to these issues, it cannot matter what the foreign government cartel did or did not do because Canada has always regulated all such terms independently of the cartel. No one denies that. That fact calls for summary judgment on those allegations about the prices and terms on sales of uranium from Canada to the United States.

No allegations of discovery failure can alter that fact because there can be no discovery on issues as to which plaintiff cannot have a claim. If TVA can establish discovery failures calling for some sanction, that must be done with respect to other issues. TVA wrongly suggests that petitioners' motion for partial summary judgment sought to prevent adjudication of allegations of misconduct in the United States. That is not true, and deliberate confusion of what petitioners do and do not seek should not be allowed to defeat the act of state doctrine where it is clearly applicable.[4]

TVA attempts to avoid application of the act of state doctrine by contending, first, that conclusive weight need not be given to the official representations of Canada about the cartel, and, second, that Canada did not really say that the cartel was firm Canadian policy. These contentions are beside the point because they are directed to Canada's description of the scope of the foreign government cartel and not to Canada's separate regulation of all export terms and prices.

In any event, these contentions by TVA represent narrowly partisan advocacy and, if accepted, would be harmful to the United States as a whole. They are prescriptions for disaster both in foreign policy and in litigation.

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[4] Petitioners will not address the contention that petitioners' claim is really one of sovereign compulsion or that act of state involves a rule of decision rather than a denial of jurisdiction. However these somewhat esoteric questions might be decided, the result should still be partial summary judgment. No matter what the legal label, a plaintiff may not litigate the legality of export terms set by a foreign government.

The requirement that conclusive weight be given a foreign government's representations of its own law is necessary to prevent courts from being drawn into foreign policy. In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court recognized that inquiries into the credibility of such foreign government representations plunge state courts into the area of foreign policy. That conclusion is equally applicable to federal courts.

The alternative to this rule destroys the act of state defense in cases where it is needed most. If defendants like petitioners may not rely upon Canada's official statements, how can they prove what Canada did? Canadian government officials will not appear in various state and federal courts to testify to their actions and have their veracity tested by cross-examination. Canada will not allow documents reflecting governmental decisions to be produced here for plaintiffs to search. Yet the trial court stated that what Canada did is an issue of fact for the jury. The situation is impossible. If conclusive weight is not given, no defendant will be able to establish what occurred under a regulatory program. That means courts will interfere with foreign relations, defendants will be unjustly convicted, and American business will be unable to invest abroad because unable to comply with foreign regulation without risking murderous antitrust damages.

TVA's second tactic is to portray the role played by the Government of Canada in the initiation and operation of the cartel as no more than mere encouragement and approval, "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." (TVA Br. at 14.) That is a blatant mischaracterization of what Canada has said and is an insult to a close ally. Far from indicating only a peripheral involvement in the cartel, the formal statements of Canada filed with the trial court make the following specific points:

(1) The cartel was *initiated* by the Government of Canada. (Main App. H 76a-77a.)

(2) Canada's establishment of and participation in the cartel was *viewed as necessary* to safeguard Canadian national interests. (Main App. H 78a.)

(3) Canadian government officials, acting in that capacity, took an *active role* in all phases of the cartel. (Main Apps. H 77a-78a, I 107a n. 7.)

(4) Participation in the cartel by private producers was a matter of *firm national policy*. (Main App. H 78a.)

(5) The terms and conditions set by the cartel, with official Canadian government involvement, were implemented by means of *government directives*. (Main App. I 107a.)

(6) Producer compliance with these directives was *monitored by government officials* on a transaction by transaction basis. (Main App. I 107a.)

(7) A producer's failure to comply with Canadian regulation was subject to the sanction of the *denial of export permits*. (Main App. I 108a.)

(8) Even apart from the cartel, the prices and terms of all export sales, including those to the United States in general, and those to TVA in particular, have been and are subject to control, review and regulation by the Canadian government. (Main App. I 109a.)

These representations clearly establish that Canada's regulation of its uranium industry, both in formulating and implementing the terms of the cartel and regulation independent of the cartel, is an act of state and, further, that any impact in the United States resulting from such

regul tion stems from conduct of Canadian producers taken under sovereign compulsion.[5]

Had respect for these doctrines and Canada's representations been shown, the issue remaining for trial would have been whether an American corporation, with knowledge of the cartel derived from a foreign subsidiary participating under government compulsion, engaged in anticompetitive conduct in the United States in violation of antitrust law.[6]

3. The Issuance Of A Writ of Mandamus Is Not An Appropriate Remedy Here, It Is The Only Adequate Remedy Available.

The issuance of a writ of mandamus is the only means available to prevent what will undoubtedly be further judicial exacerbation of American relations with Canada. The trial court here proposes that a trial be held during which an American jury will weigh and determine the credibility of the formal statements of Canada. Seeking a writ of mandamus from the court of appeals is not an adequate alternative to the issuance of such a writ by this Court. The credibility of the Canadian government will be debated by the parties until the issue is ultimately decided by this Court. That affront should not be allowed to continue through a lengthy trial and appellate process when the legal issues are clear and ripe for disposition now.

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[5] These procedures are almost identical to those recently adopted by Japan with respect to its automobile exports. (Reply App. A.) Further, the U.S. Attorney General has concluded that such procedures constitute *sovereign compulsion* and that compliance "would not give rise to violations of United States antitrust laws." (Reply App. B.)

[6] This is precisely the course of conduct suggested by Canada in its *amicus* brief filed in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1380.

Further delay, moreover, can only create doubt as to the ability of the United States to carry out recent agreements with Japan without judicial interference. The U.S. Attorney General has assured Japan that its plan to reduce automobile exports to the United States will not result in antitrust liability.[7] Given the actions of the court below, the Attorney General may have been overly optimistic. Because Japanese export limits were set in consultation with Japanese automobile manufacturers, private antitrust litigation is almost certain to follow any reduction in Japanese exports. Plaintiffs will undoubtedly demand to see Japanese documents in order to determine the scope of the "compulsion" and the possibility of illegal acts outside the regulation.

Japan may well react, as did the uranium exporting countries, by refusing to permit the production of documents for an inquiry that must inevitably reveal the details of the formation of its economic and foreign policies. Based upon the precedent set below, even formal statements from the Japanese government will not prevent abrasive American judicial inquiry. That inquiry will undenably impede important diplomatic efforts, and, the entry of adverse judgments, by default or otherwise, would end any chances of success in such efforts.

The only way to be certain that emerging American foreign policy is not frustrated by judicial interference is for this Court to take this opportunity to announce definitive rules regarding the limits of judicial inquiry into the internal affairs of other countries.

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[7] See, Footnote 5, *supra*.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for a Writ of Mandamus, a writ of mandamus should issue.

Respectfully submitted,

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May 26, 1981

APPENDICES

APPENDIX A

LETTER FROM AMBASSADOR OF JAPAN TO U. S. ATTORNEY GENERAL (MAY 7, 1981)

EMBASSY OF JAPAN
WASHINGTON

May 7, 1981

The Honorable
William French Smith
Attorney General of the
United States of America
Department of Justice
Washington, D. C. 20520

Dear Mr. Attorney General:

I have the honor to inform you that the Government of Japan, through explanations by the United States Government fully understands the difficult situation of the U.S. auto industry.

Based upon the above understanding, the Government of Japan will unilaterally restrain the volume of cars to be exported from Japan to the U.S., according to the scheme explained hereinafter, in order to cooperate with efforts to be taken for the recovery of the automobile industry in the U.S.

The Government of Japan considers the orderly export of Japanese products to be one of its basic trade policies so as not to create disruption in the national economies of other countries. On May 1, 1981, the Cabinet members concerned met, considered the attached scheme, and approved it.

It is the Ministry of International Trade and Industry (MITI) that has authority and responsibility for administering concretely Japan's basic trade policies.

The above-mentioned measures concerning Japanese car exports to the U.S. will be put into practice through

written directives setting the maximum number of exportable units of passenger cars to the U.S. for each Japanese automobile company, to be given by MITI in accordance with its authority for bringing into action trade policies set forth in Article Three (3) of the establishment law of MITI, as well as Article Forty-eight (48) of The Foreign Exchange and Foreign Trade Control Law (Law No. 228 of 1949).

Adherence to these directives will be secured by reports on car exports to the U.S. which are to be collected separately from each company under the competent authority and responsibility of MITI.

Further, if any firm should fail to make a report or should make a false report in violation of the provisions of Article Sixty-seven (67) of the Foreign Exchange and Foreign Trade Control Law, that firm will be proceeded against for punishment under Articles Seventy-two (72) and Seventy-three (73) of the Law.

If on the basis of the above reports it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make car exports to the U.S. subject to export licensing, by amending the Export Trade Control Order (Cabinet Order No. 378 of 1949) in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law. MITI would then enforce the export maximums it had established for each company by refusing to license exports in excess of those maximums. The Government of Japan has the authority under Japanese Law to impose this requirement. It would be a violation of Japanese law to export cars without an export license in that situation, and any company engaging in such violation would be proceeded against for imposition of fines, penalties or other sanctions as provided by Article Seventy (70) of the Foreign Exchange and Foreign Trade Control Law.

As the above-mentioned directives setting limits for exportable cars and collecting reports from each company come as a result of the administrative authority inherent in the Government of Japan in accordance with the laws of Japan each company must obey the orders of the Government of Japan.

The Government of Japan considers that implementation of such an export restraint by the Government of Japan, including the division of the maximum number of exportable units among the companies by MITI, and compliance with the restraints by Japanese automobile companies, would not give rise to violations of American antitrust laws. However, the Government of Japan requests that the Department of Justice, as the authority chiefly responsible for administering the U.S. laws, support the views of the Government of Japan.

Further, as to the export of passenger cars to Puerto Rico and the export of automobiles which are classified under "commercial vehicles" in JAMA statistics, but classified under "passenger cars" in the U.S., to the U.S. and Puerto Rico, we would like to know that the views of the Department of Justice are the same regarding the above should the Government of Japan restrain exports through the same measures mentioned above.

Sincerely yours,

/s/ Yoshio Okawara
YOSHIO OKAWARA
Ambassador of Japan

Attachment

The Ministry of International Trade and Industry (MITI) would issue written directives (see attached) to each of the seven (7) Japanese companies that export passenger cars to the U.S. regarding the maximum number of exportable units of each company. These numbers will be decided by MITI at its discretion under its authority in Article Three (3) of the Ministry of International Trade and Industry Establishment Law.

To monitor this action MITI would obtain monthly reports from each company on its exports to the U.S. under its authority in Article Ten (10) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended).

At the receipt of these reports, if there is any question or actual case that any one or more companies threatens to exceed the maximum number of export units set for it, the Government of Japan will promptly make the export of cars to the U.S. subject to export licensing, under its authority in Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, by amending the Export Trade Control Order to include such exports. This will be done sufficiently promptly so that all units in fact exported in excess of the maximum number will be subject to sanctions for violation of the Export Trade Control Order.

With regard to exports of passenger cars to Puerto Rico and exports of "non-passenger-car automobiles" * (as defined below) to the U.S. and to Puerto Rico, the Government of Japan intends to follow the same scheme as described above, and use directives in the same form as the attached.

May 7, 1981

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* "Non-passenger-car automobiles" means automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the Tariff Schedules of the United States.

The number of passenger cars * to be exported to the United States ** by ———— during the period of ———— to ———— shall not exceed: ———— units.

It is directed that the monthly number of passenger cars exported to the U.S. be reported to the Minister of International Trade and Industry by the ———— of every month in accordance with Article 67 of the Foreign Exchange and Foreign Trade Control Law and Article 10 of The Export Trade Control Order. The form of such monthly reports will be specified separately. Any failure to report or submission of false reports shall be punished under Articles 72(8) and 73(1) of the Foreign Exchange and Foreign Trade Control Law.

The authority for the issuance of this directive derives, first, from Article 3 of the Ministry of International Trade and Industry Establishment Law, which charges MITI with the authority and responsibility for the promotion and adjustment of trade, and the promotion of international cooperation in the trading economy. The authority for this directive also derives from Article 48 of The Foreign Exchange and Foreign Trade Control Law. If your company does not observe this directive, then the Government of Japan will promptly make the export of passenger cars to the U.S. subject to export licensing in accordance with Article 48 of The Foreign Exchange and Foreign Trade Control Law and Articles 1(1) of The Export Trade Control Order. In such case, MITI will not issue licenses for the export by ———— of passenger cars to the United States in excess of the number specified above.

May 7, 1981

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* "Passenger cars" in this directive shall include ordinary automobiles, small-size automobiles and light automobiles (except two-wheeled), as defined by the Road Transport Vehicles Law (Law No. 185 of 1951).

** "United States" means the 50 states and the District of Columbia.

APPENDIX B

LETTER FROM U.S. ATTORNEY GENERAL TO AMBASSADOR OF JAPAN

(MAY 7, 1981)

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530
May 7, 1981

His Excellency
Yoshio Okawara
Ambassador of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Ambassador:

This letter is in response to the request of the Government of Japan, set forth in its letter of May 7, and the two enclosures thereto, for the views of the Department of Justice on antitrust questions regarding measures now being considered by the Government of Japan to unilaterally restrain the export of passenger cars to the U.S. so as to cooperate with the U.S. Government's domestic automobile industry recovery program.

The Government of Japan has advised us that the Ministry of International Trade and Industry (MITI), which it represents has legal authority and responsibility in the Government of Japan for carrying out basic trade policy, including authority to take the measures described in your letter and its two enclosures, and has authority to maintain orderly exports, will establish at its discretion the maximum number of passenger cars which may be exported to the U.S. by individual Japanese companies. MITI will issue a written directive to each company stating the maximum number of cars

that company may export to the U.S. in a specified period.

Further, MITI will direct individual companies to submit accurate monthly reports on passenger car exports to the U.S. so as to assure the implementation of the export limitation directive. It is understood, and the directive will state that, in any case in which it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make the export of cars to the U.S. subject to export licensing, in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, (Law No. 228 of 2949), and Article One (1) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended), by amending the Export Trade Control Order. MITI will then enforce the export maximums it established for each company by refusing to license exports in excess of those maximums. The Government of Japan has advised us that MITI has the authority to impose this requirement, that it would be a violation of Japanese law to export cars without an export license in that situation, and that such violation would be punished pursuant to Japanese law by fines, penalties or other sanctions.

In these circumstances, we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and compliance with the program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.

Further, in response to your inquiry regarding exports of passenger cars to Puerto Rico and the exports of automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the U.S., we would like to state that if export limitations are achieved through the same measures and authorities previously described, the sovereign compulsion defense to any antitrust action that might be brought under United States laws would be equally available.

Sincerely,

/s/ William French Smith
WILLIAM FRENCH SMITH
Attorney General